

Comments

Hypnosis—Should the Courts Snap Out of It?— A Closer Look at the Critical Issues

I. INTRODUCTION

At 1:00 a.m. on June 29, 1983, Mary Doe had just finished work and was making her way through the parking lot.¹ The night was cool, and Mary walked hurriedly toward her car that was parked under the lot's only mercury light. While she stood beside her car and fumbled for her keys, Mary heard footsteps quickly approaching from behind.

She turned and screamed as her attacker grabbed her and forced her to the pavement. A coworker, upon hearing Mary scream, called for her and started running towards the scene. The attacker, not knowing what to do, demanded Mary's car keys, and threatened harm to her if she did not comply. In fear, Mary readily turned over her keys. The attacker then jumped into the car and sped away. The police arrested a suspect several hours later as he was driving the stolen car down a city side street.

In recounting her story to the police, Mary was unable to give a description of her attacker. She had no conscious memory of the incident. The initial shock had caused her to block the entire event from her mind.

The case was set for trial. The defendant was charged with one count of attempted rape and one count of grand theft. His defense was that a friend, whom he refused to identify, lent him the car a half-hour before he was arrested by the police. He claimed to know nothing of the attempted rape or that the car had been stolen. Because Mary remained unable to identify her assailant, the prosecutor called in a qualified hypnotist for assistance in refreshing Mary's memory. Prior to hypnosis, the prosecutor deposed Mary and took her statement concerning the event. The defense attorney questioned her extensively as well. Under hypnosis, with only the hypnotist and Mary present, Mary was able to recall the entire episode. She was then able to give an accurate description of her attacker. The description given was consistent with the general description given by the coworker who caused the suspect to flee, and it closely matched that of the defendant's appearance. With the help of Mary's testimony, the defendant was convicted on both counts.

In the above hypothetical case, the technique of hypnosis was successfully employed to assist the victim in recalling a previously unrecallable event. Without its aid, the police could not have constructed a case sufficient to convict the defendant. Yet, what is this phenomenon called hypnosis? And why and to what extent has it worked its way into the courtroom? Within the courtroom, what are its problems? If such problems exist, are they unique to hypnosis? How can these problems most effectively be overcome?

1. This is a hypothetical case constructed purely for illustrative purposes.

The purpose of this Comment is to determine when and under what theories hypnotically induced testimonial evidence should be admissible in a court of law. No attempt is made to explain fully the intricacies of the hypnotic phenomenon itself,² nor to analyze completely all of its potential uses within the legal system.³ The primary focus of this Comment will be on the use of pretrial hypnosis, in civil or criminal litigation,⁴ to help refresh a potential trial witness' imperfect memory.

The typical scenario in which the issue of pretrial hypnosis arises was illustrated by the hypothetical case. A witness or victim is, either because of traumatic neurosis or other pathological reasons, unable to recall a certain event. To overcome this problem, the witness is placed in a hypnotic state. This hypnotic state enables the subject to achieve a heightened state of concentration focused on the particular event in question. Because of this heightened state, the individual is better able to examine and retain the facts and details of the incident, and becomes a greater asset to the police and the courts.

Over the past quarter century, a number of courts have permitted the use of hypnosis to refresh a witness' memory. Some of these courts have held that the application of hypnosis merely raises a question of credibility to be decided by the trier of fact.⁵ Other courts admit hypnotically induced testimony, but do so on the condition that the hypnotic technique employed meet certain procedural safeguards,⁶ the adequacy of which is to be determined by the judge. Many courts refuse to admit the hypnotically induced testimony,⁷ and base this denial of admission on the *Frye* rule,⁸ claiming that hypnosis has not yet met the *Frye* standards.

The lack of conformity among the different jurisdictions is caused by differing beliefs concerning the reliability and effectiveness of the hypnotic process. Courts

2. For a closer look at the technique of hypnosis itself, see generally J. BRAMWELL, *HYPNOTISM, ITS HISTORY, PRACTICE AND THEORY* (2d ed. 1906); D. CHEEK & L. LECRON, *CLINICAL HYPNOTHERAPY* (1968); E. HILGARD, *THE EXPERIENCE OF HYPNOSIS* (1968); M. KLINE & L. WOLBERG, *THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES* (1962); G. ULETT & D. PETERSON, *APPLIED HYPNOSIS AND POSITIVE SUGGESTION* (1975); Pavlov, *The Identity of Inhibition With Sleep and Hypnosis*, 17 SCI. MONTHLY 603 (1923).

3. For example, this Comment will not discuss the use of hypnosis as a truth determinant or the use of hypnosis on a witness who is in the process of testifying at trial.

4. The majority of cases discussed herein are criminal. The use of hypnosis within the criminal context is a more difficult situation because of the protective constitutional rights of an accused. This Comment will be applicable to both criminal and civil cases. The sections that deal exclusively with an accused's rights will obviously not be applicable to civil cases, although due process rights must still be taken into consideration.

5. See *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979); *People v. Smrekar*, 68 Ill. App. 379, 385 N.E. 2d 848 (1979); *Pearson v. State*, ___ Ind. ___, 441 N.E.2d 468 (1982); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982).

6. See *Brown v. State*, 426 So.2d 76 (Fla. Dist. Ct. App. 1983); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *People v. McDowell*, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (N.Y. Sup. Ct. 1980); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982).

7. See *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1 81); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 458 U.S. 1125 (1982); *People v. Quintanar*, ___ Colo. App. ___, 659 P.2d 710 (1982); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983); *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981).

8. See *infra* text accompanying notes 72-74.

that refuse to admit hypnotically induced testimony believe that several unresolved problems remain with hypnosis, and hold that until these problems are resolved, the art of hypnosis will remain an impermissible testimonial aid. Courts that admit the hypnotically induced testimony recognize the difficulties in using hypnosis, but believe either that these difficulties merely affect credibility, or that they can be overcome by adherence to procedural safeguards.

This Comment will discuss the different approaches courts have adopted in dealing with hypnotically induced testimony.⁹ The alleged problems with hypnosis will then be identified and examined, and a comparison of these problems will be made with the deficiencies found in ordinary eyewitness testimony,¹⁰ culminating in a suggested series of formal guidelines to be followed.¹¹

II. HYPNOSIS—WHAT IS IT?

Hypnosis has been defined as "an alteration in consciousness and concentration, in which the subject manifests a heightened degree of suggestibility, while awareness is maintained,"¹² or as a super-concentrated state of mind that may be brought about by direct or indirect suggestion.¹³ Individuals often associate various falsities and misconceptions with hypnosis. To overcome these misconceptions, one author and hypnotist has espoused a negative definition of hypnosis: Hypnosis is "Not a State of Sleep . . . Not an Unconscious State . . . Not a Physiological Condition . . . Not a 'Control' Condition."¹⁴ But the hypnotist would go no further in affirmatively defining hypnosis than to state that "[h]ypnosis is a subjective state of mind in which a person is more prone to accept acceptable suggestion."¹⁵

The art of hypnosis has been practiced since ancient times.¹⁶ Throughout much of its history, hypnosis was considered a mysterious¹⁷ and unnatural phenomenon, often associated with various men of evil and ill-repute.¹⁸ The modern era of hypnosis began in the eighteenth century, when Dr. Franz Anton Mesmer used "animal magnetism"¹⁹ to enchant his patients as a prelude to their treatment. Dr. Mesmer's

9. See *infra* text accompanying notes 34-125.

10. See *infra* text accompanying notes 150-70.

11. See *infra* part VII.

12. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 OHIO ST. L.J. 567, 570 (1977).

13. H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION 17 (1967) (quoting Dr. S. J. VanPelt, editor of the *British Journal of Medical Hypnotism*).

14. *Id.* at 11-13.

15. *Id.* at 15.

16. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 317 (1980).

17. Comment, *Refreshing The Memory Of A Witness Through Hypnosis*, 5 U.C.L.A.—ALASKA L. REV. 266, 270 (1976).

18. It was thought that the monk Rasputin used hypnosis to influence the Russian Czarina. Diamond, *supra* note 16, at 320 n.26.

19. Spector & Foster, *supra* note 12, at 567-68:

Dr. Franz Anton Mesmer, convinced that a type of "animal magnetism" emanated from the hands of the hypnotist like electric current, ensconced groups of patients around a "baquet," a large circular tub of cold water filled with glass and iron filings, as a prelude to therapy. Iron rods protruding from the tub were touched to the afflicted parts of the patients' anatomy. As music pervaded the darkened treatment room, Mesmer appeared in flowing silken robes, and magnetized the tub by a touch of his hand, inducing "convulsive crises" in the patients.

methods were eventually condemned, and the use of hypnosis was greatly discredited. Nevertheless, in the early part of the nineteenth century, hypnosis acquired scientific respectability through its use as a psychological anesthesia in medical surgery.²⁰ By the middle of the century, however, due to the development of ether and other anesthetics, the need for hypnosis as an anesthesia had diminished.²¹ The utility of hypnosis was finally discovered in the late 1800s when Sigmund Freud applied it to the treatment of the mentally and emotionally disturbed.²² Since that time, acceptance of hypnosis as a valid therapeutic method for treating mental disorders grew slowly; finally, in 1958, hypnosis was recognized by the American Medical Association as an acceptable and valuable medical tool.²³

Hypnosis has become extremely important in a number of areas. Within the field of medicine, its benefits are scarcely questioned. Hypnosis is used as a relaxant in calming the nerves of individuals,²⁴ as an analgesic in reducing or eliminating senses of pain,²⁵ as a device in identifying and curing the problems of persons with multiple personalities,²⁶ as a tool in deciphering and interpreting dreams and hallucinations,²⁷ as a means of aiding memory recall and overcoming amnesia,²⁸ and, in general, as a means of understanding and treating many forms of mental illness.

In addition, hypnosis has become increasingly useful in the area of criminal investigation,²⁹ in which hypnosis is typically used to assist authorities in various investigations by enhancing people's memories. It may be used to help a witness recall license plate numbers,³⁰ "names and places, and other details of an event."³¹ Police departments also use hypnosis to solve amnesia cases, which otherwise may take days or even weeks to decipher.³²

III. THE EXTENT TO WHICH HYPNOSIS HAS WORKED ITS WAY INTO THE COURTROOM

The practical uses of hypnosis within the medical and law enforcement fields are apparent from the above discussion. Because of its efficacy in these areas, hypnosis

See also Note, *The Admissibility of Hypnotically Induced Recollection*, 70 Ky. L.J. 187, 189 (1981-82).

20. See Diamond, *supra* note 16, at 318 n.21.

21. *Id.*

22. *Id.* at 319.

23. Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1958).

24. E. HILGARD, *DIVIDED CONSCIOUSNESS: MULTIPLE CONTROL IN HUMAN THOUGHT AND ACTION* 163 (1977).

25. *Id.* at 171.

26. *Id.* at 17.

27. *Id.* at 87.

28. H. ARONS, *supra* note 13, at 34-39.

29. The highly publicized use of hypnosis in the Sam Shephard case and the Boston Strangler case has accelerated its use. L. TAYLOR, *EYEWITNESS IDENTIFICATION* 85 (1982).

30. One famous case in which hypnosis was used successfully to identify a license plate number was the Chochilla kidnapping case. This 1976 case presented a difficult problem for the F.B.I. It involved the hijacking of a school bus filled with children:

Neither the children nor the bus driver could identify their three abductors, nor could they supply any information that might lead to their identification. The F.B.I. finally called in a hypnotist, Dr. William Kroger, to hypnotize the bus driver. While under hypnosis, the bus driver was able to recall all but one digit of the kidnappers' license plate number. Armed with this information, the three men were soon found, arrested, and convicted.

Id.

31. H. ARONS, *supra* note 13, at 27.

32. *Id.* at 28.

has slowly worked its way into the court system, where it has occasionally been used in pretrial proceedings to refresh a witness' imperfect memory, or to overcome a witness' problem of amnesia.³³

The first American case to address the issue of pretrial hypnosis was *People v. Ebanks*.³⁴ In *Ebanks* the accused tried to prove his innocence through the use of testimony by an expert witness. The expert attempted to testify that prior to trial the defendant had denied his guilt while under hypnosis.³⁵ The trial court refused to admit the testimony, stating simply that "[t]he law of the United States does not recognize hypnosis."³⁶ On appeal the California Supreme Court refrained from debating the issue and summarily agreed with the trial court, stating simply that "the [trial] court was right."³⁷ For many years following the decision in *Ebanks*, courts continued to exclude hypnotically induced testimony. The 1962 Ohio Common Pleas Court decision in *State v. Nebb*³⁸ was the first case explicitly allowing the admission of hypnotically induced testimony.³⁹

A. The Acceptance of Hypnosis by the Courts

*Harding v. State*⁴⁰ was the first reported case to sanction the use of pretrial hypnosis. In *Harding* the defendant, while riding in a car with the victim and another couple, pulled out a gun and shot the victim in the chest. He then removed the victim from the car and abandoned her along the side of a desolate road. Later the defendant returned to the victim and raped her while she lay unconscious.⁴¹ The trial court found the defendant guilty of assault with intent to rape and assault with intent to murder.⁴² The decision was affirmed on appeal.⁴³ Following the shooting, the victim fell into a state of shock and was unable to recall any subsequent events. Hypnosis was successfully employed, resulting in the victim's substantial recall of the episode. The trial court allowed the victim to testify over the defendant's objection. On appeal

33. Generally there are three types of amnesia. Congrade amnesia involves the total loss of recall of the event itself, retrograde amnesia is amnesia of events preceding the incident in question, and anterograde amnesia is amnesia of the events following the incident. Spector & Foster, *supra* note 12, at 572. See generally E. HILGARD, *supra* note 24, at 62-86.

34. 117 Cal. 652, 49 P. 1049 (1897).

35. *Id.* at 665, 49 P. at 1053.

36. *Id.*

37. *Id.*

38. No. 39,540 (C.P. Franklin Co., Ohio, May 28, 1962). *State v. Nebb* is discussed in Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964).

The defendant, Arthur Nebb, believing that his wife, Bernice, was in bed with another man, drove to his wife's home (they were living apart at the time). Upon arriving at the house, the defendant, with gun in hand, entered the house and shot and killed an innocent friend of Bernice. He also wounded his wife. Evidence indicated that the two were merely talking at the time of the shooting. Arthur was charged with first degree murder.

At trial, before the judge and the party attorneys (the jury was temporarily dismissed), Arthur was hypnotized by a hypnotist. While under hypnosis, Arthur indicated that he never intended to kill the friend, but supposedly mistook her for the man he thought his wife was in bed with. After the hypnotic session, the prosecution decided to amend the indictment and proceed on a charge of manslaughter, and to file on information charging Arthur with aggravated assault. Arthur Nebb pleaded guilty to both offenses. No. 39,540, at 4-8 (C.P. Franklin Co., Ohio, May 28, 1962).

39. Although *State v. Nebb* involved testimony hypnotically induced while the witness was on the stand, this Comment does not address the propriety of such tactics.

40. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied* 395 U.S. 949 (1969).

41. *Id.* at 232-35, 246 A.2d at 304-05.

42. *Id.* at 232, 246 A.2d at 304.

43. *Id.* at 247, 246 A.2d at 312.

the Maryland Court of Special Appeals stated that the admission of the victim's testimony concerning the crime was not improper.⁴⁴ The court took the position that even though the witness had testified to events recalled with the aid of hypnosis, this was not a ground for exclusion; rather, it was merely a credibility factor to be considered by the trier of fact when evaluating the truthfulness of the witness' testimony.⁴⁵ In reaching this conclusion, the court stated:

On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in this case the jury, must decide.⁴⁶

Since 1968, other courts⁴⁷ have reiterated the *Harding* outcome, holding that the effect of hypnosis goes to the weight of the evidence and not to its admissibility. The Oregon Court of Appeals, in *State v. Jorgensen*,⁴⁸ found that even though the witness had related different stories at previous times, this would not be a basis for disallowing the testimony.⁴⁹ The jury was to determine the credibility of the witness,⁵⁰ and the use of hypnosis was merely a factor that would affect the credibility of the testimony.⁵¹ The Ninth Circuit, in *Wyller v. Fairchild Hiller Corporation*,⁵² reached the same conclusion, holding that "[h]is [the witness'] credibility and the weight to be given such testimony were for the jury to determine."⁵³

In allowing the hypnotically induced testimony into evidence, the theory of present recollection refreshed is the underlying principle that sanctions hypnosis as a proper device in refreshing one's memory. This theory is implicit in the reasoning of the above state court cases, and was noted by the Ninth Circuit in *Wyller*.⁵⁴ The ability of witnesses at trial to refresh their memories has long been recognized by the courts in both England and the United States.⁵⁵ The established procedure is to provide the witness with a written document, memorandum, or any other object or device that will aid the witness' memory while being examined on the stand. If the witness can testify from memory alone, after having reviewed the memorandum, then the witness' memory has truly been refreshed. This is termed present recollection refreshed.⁵⁶ Conversely, if upon examining the memorandum the witness is unable to testify from memory, but instead can only testify by expressing the contents of the memorandum that has been presented, then the witness is merely relying on the

44. *Id.* at 236, 246 A.2d at 306.

45. *Id.*

46. *Id.*

47. *United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *People v. Smrekar*, 68 Ill. App. 379, 385 N.E.2d 848 (1979); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971).

48. 8 Or. App. 1, 492 P.2d 312 (1971).

49. *Id.* at 9, 492 P.2d at 315.

50. *Id.*

51. *Id.*

52. 503 F.2d 506 (9th Cir. 1974).

53. *Id.* at 509.

54. *Id.*

55. 3 J. WIGMORE, EVIDENCE § 735 (Chadbourn rev. ed. 1970).

56. C. MCCORMICK, EVIDENCE § 9 (2d ed. 1972).

written recital of matters remembered in the past. This is considered past recollection recorded, and is distinguished from present recollection refreshed.⁵⁷ The court in *Wyller* found the use of hypnosis in refreshing a witness' memory to be a form of present recollection refreshed.⁵⁸ The witness, while on the witness stand, is recollecting from his own memory and is not testifying with the assistance of any outside writing; therefore the court is correct in stating that the recollection is present recollection, and not past recollection. The *Wyller* decision attaches a solid principle⁵⁹ to the use of hypnosis, and provides a reasoned basis for the admissibility of hypnotically induced testimony.

In 1979, five years after *Wyller*, the Ninth Circuit, in *United States v. Awkard*,⁶⁰ went one step further in admitting hypnotically induced evidence. In *Awkard* the court elaborated on its earlier decision and stated that "[b]ecause there is no issue about the admission of hypnotically refreshed evidence, there is no need for a foundation concerning the nature and effects of hypnosis."⁶¹ Thus, by alleviating the need for the laying of a proper foundation prior to admitting hypnotic testimony into evidence, the court effectively buttressed the case for its admissibility. The Ninth Circuit appears to be the only court to date that has gone this far (*i.e.*, omitting the requirement of a foundation) in admitting hypnotic testimony.

In *State v. Greer*,⁶² a 1980 case, the Missouri Court of Appeals reviewed the past history of cases dealing with hypnosis. The court found that the majority⁶³ of states that have considered the issue have held that hypnotically refreshed testimony is not, as a matter of law, inadmissible.⁶⁴ The court went on to note that "[t]he line of authority admitting such evidence reasons that hypnosis aids recall, and later identifications are made from refreshed recollections."⁶⁵ The court concluded that the authorities hold the effect of hypnosis to be merely an element to be weighed by the trier of fact.⁶⁶

B. *The Rejection of Hypnosis Within the Pretrial Process*

Despite the history of cases admitting hypnotically induced testimony into evidence, a recent trend among the courts today has been either to limit severely the use

57. 3 J. WIGMORE, *supra* note 55, § 738 (Chadbourn rev. ed. 1970). Present recollection is generally considered more accurate than past recollection, and is therefore preferred. *Id.*

58. 503 F.2d 506, 509 (9th Cir. 1974).

59. The principle of allowing witnesses to refresh their memories from a prior writing is included in the Federal Rules of Evidence. See FED. R. EVID. 612.

60. 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

61. *Id.* at 669.

62. 609 S.W.2d 423 (Mo. App. 1980).

63. See *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *People v. Smrekar*, 68 Ill. App. 379, 385 N.E.2d 848 (1979); *Commonwealth v. Juvenile*, 381 Mass. 727, 412 N.E.2d 339 (1980); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *People v. McDowell*, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (N.Y. Sup. Ct. 1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981).

64. 609 S.W.2d 423, 433 (Mo. App. 1980).

65. *Id.*

66. *Id.*

of hypnosis,⁶⁷ or to deny the admissibility of it *in toto*.⁶⁸ In *State v. Mack*⁶⁹ the Supreme Court of Minnesota chose the latter approach. The court expressed concern over the potential problems with the use of hypnosis, and ruled that information elicited through pretrial hypnosis is inadmissible in criminal proceedings.⁷⁰

1. *The Applicability of the Frye Rule*

The *Mack* court held that the art of hypnosis, as understood today, has yet to meet the standards set forth in *Frye v. United States*.⁷¹ Until the *Mack* decision, no court had explicitly applied the *Frye* rule in considering the admissibility of testimony induced through hypnosis. The issue in *Frye* was the admissibility of the results of a "deception test" (an early form of what is known today as the polygraph test)⁷² into evidence. In discussing the deception test, the court of Appeals for the District of Columbia held that "the thing [the scientific principle in question] from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁷³ Consequently, under the *Frye* rule, mechanical or scientific testing results are inadmissible unless the testing technique has evolved to the point at which experts in the field largely share the view that the results are scientifically reliable as accurate.⁷⁴

In applying the *Frye* doctrine to hypnosis, the *Mack* court stated:

[a]lthough hypnotically-adduced "memory" is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation. . . . Such results are not scientifically reliable as accurate.⁷⁵

The effect of the *Mack* decision is a determination that hypnosis has not yet reached the plateau of general acceptance within the medical community as a reliable device in accurately refreshing one's memory.

67. See *Commonwealth v. Juvenile*, 381 Mass. 727, 412 N.E.2d 339 (1980); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181 (N.Y. Sup. Ct. 1980); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981).

68. See *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 458 U.S. 1125 (1982); *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981).

69. 292 N.W.2d 764 (Minn. 1980).

70. *Id.* at 771.

71. 293 F. 1013 (D.C. Cir. 1923).

72. The polygraph, or "lie detector" . . . is basically a machine that is hooked up to the subject in such a way that his respiration rate, perspiration (through detection of skin conductivity), blood pressure and/or pulse is recorded as he answers questions posed by the examiner. The theory is that a suspect's or witness' awareness that he is lying, combined with concern over being caught in a lie, create emotional disturbances which are transformed into physiological changes which can be detected by the machine.

L. TAYLOR, *supra* note 29, at 71 (1982).

73. 293 F. 1013, 1014 (D.C. Cir. 1923).

74. *State v. Mack*, 292 N.W.2d 764, 767 (Minn. 1980).

75. *Id.* at 768. "Confabulation" is defined as "the filling in of memory gaps with false memories or inaccurate bits of information." Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 5 (1977).

2. Differing Interpretations of *Frye* v. United States

In some jurisdictions⁷⁶ the *Frye* rule is held inapplicable to the use of pretrial hypnosis. One view is to interpret *Frye* as pertaining only to mechanical testing devices,⁷⁷ therefore making it inapplicable to hypnosis. The scientific evidence in question in *Frye* concerned the validity of the results of a polygraph test. The *Frye* rule was eventually extended to other mechanical devices as well. For example, it has been applied to such physical tests as radar⁷⁸ and voiceprints.⁷⁹ *Frye*, however, is not applied consistently to all scientific evidence. Rather, if and how the courts will apply it to any given situation is unclear.⁸⁰

Thus, one can support the position that *Frye* is limited to mechanical testing devices. Nevertheless, the courts have not generally adhered to that view.⁸¹ Instead, courts tend to conclude either implicitly or explicitly that "[l]ike the results of a polygraph examination or voiceprint analysis, the credibility of recall stimulated by hypnosis depends upon the reliability of the scientific procedure used."⁸² The result of applying the *Frye* rule to hypnosis in this way is to hinge the admissibility of hypnotically induced testimony on the acceptance of hypnosis itself, regardless of whether expert testimony is required to interpret or explain the hypnosis.

Yet another reading of *Frye* would be to apply the rule only to expert testimony concerning the scientific method.⁸³ Under this approach, *Frye* would be inapplicable

76. The majority of courts that have admitted hypnotic testimony have not applied the *Frye* rule. See *United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *People v. Smrekar*, 68 Ill. App. 379, 385 N.E. 2d 848 (1979); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971). *But see State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981) (courts apply *Frye* rule to hypnosis, yet hold hypnosis admissible in certain instances).

77. See *State v. Hurd*, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981), where the court recognized this view without adopting it. See also Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313 (1964), *miner*. The theory is that a suspect's or witness' awareness that he is lying, combined with concern over being caught in a lie, create emotional disturbances which are transformed into physiological changes which can be detected by the machine.

L. TAYLOR, *supra* note 29, at 71 (1982).

79. See *Commonwealth v. Lykes*, 367 Mass. 191, 327 N.E.2d 671 (1975); *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967).

80. See Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1221, 1228 (1980) ("Instead of using *Frye* as an analytical tool to decide whether novel scientific evidence should be admitted, it appears that many courts apply it as a label to justify their own views about reliability of particular forensic techniques.")

81. See *United States v. Brady*, 595 F.2d 359 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979) (court applies *Frye* equivalent to expert testimony concerning the microscopic comparison of hair samples); *State v. Stout*, 478 S.W.2d 368 (Mo. 1972) (*Frye* applies to the results of a blood examination by neutron activation analysis); *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (court applies the *Frye* rule to exclude expert testimony on the "battered women's syndrome").

82. *State v. Hurd*, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981). See also *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983).

83. See *Brown v. State*, 426 So.2d 76, 89 (Fla. Dist. Ct. App. 1983):

[W]e conclude that the method by which testimony is hypnotically induced is not one that falls within the ambit of *Frye*. "[T]echnically the test is not directly applicable because it is concerned with the admissibility of expert opinion deduced from the results of a scientific technique, such as a lie detector test, and not with the admissibility of eyewitness testimony."

(citing Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1217 (1981)) (emphasis in original).

to hypnosis unless expert testimony was first required as a foundation to admissibility. Yet, as noted previously, the Ninth Circuit has held that for hypnotically induced testimony "there is no need for a foundation concerning the nature and effects of hypnosis."⁸⁴ Consequently, this reading of *Frye*, if conjoined with the Ninth Circuit's reasoning, would result in the inapplicability of the *Frye* rule to hypnosis.

Most courts that nonetheless have applied the *Frye* rule to hypnosis have held that *Frye* precludes the admissibility of hypnosis, without even considering that expert testimony may not be required. Instead, they have applied *Frye* to hypnosis in a generalized manner. The Arizona Supreme Court in *State v. Mena*⁸⁵ followed the lead of the *Mack* court and adhered to the *Frye* rule in determining the admissibility of hypnosis in general. The court stated that: "until hypnosis gains general acceptance in the field of medicine and psychiatry as a method by which memories are accurately improved . . . we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases."⁸⁶

Later in the same year in which *State v. Mena* was decided, the Maryland Court of Appeals, in *Polk v. State*,⁸⁷ reviewed its earlier landmark decision in *Harding v. State*⁸⁸ and held the *Frye* rule applicable to pretrial hypnosis, just as the *Mena* and *Mack* courts had done. The court meticulously pointed out that the *Frye* rule is not only applicable to the hypnotic technique itself, but that it also encompasses the testimony adduced from it. The witness' testimony was determined to be the end product of the administered hypnosis and could not be disassociated from it.⁸⁹

Though *Polk* relied on the *Frye* doctrine, the case did not explicitly overrule *Harding*; instead, the case was remanded for a determination of whether hypnotically induced testimony had met the *Frye* test. Yet, in 1982, in *Collins v. State*,⁹⁰ the Maryland Court of Special Appeals did explicitly overrule *Harding*, holding that the *Frye* standard is applicable to hypnotically induced testimony and that hypnosis has not met that standard since it is not accepted as reliable by the relevant scientific community.⁹¹

Cases like *Collins* and *Polk* indicate a trend that could result in the complete demise of *Harding* and its progeny. Hypnotically induced testimony could continue to be held inadmissible until "hypnosis [is] generally acceptable in the relevant

84. *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), cert. denied 444 U.S. 885 (1979). See *supra* text accompanying notes 60-61.

85. 128 Ariz. 226, 624 P.2d 1274 (1981).

86. *Id.* at 231, 624 P.2d at 1279. The effect of the *Mena* decision is to hold any witness who has undergone hypnosis incompetent to testify. This complete bar of testimony of the witness was modified, however, by a subsequent Arizona case, *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982), in which the court held:

[A] witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis. . . . [But this is] assuming that such matters were remembered and related to the authorities prior to use of hypnosis.

Id. at 209, 644 P.2d at 1295 (emphasis in original).

87. 48 Md. App. 382, 427 A.2d 1041 (1981).

88. See *supra* text accompanying notes 40-46.

89. 48 Md. App. 382, 394, 427 A.2d 1041, 1048 (1981).

90. 52 Md. App. 186, 447 A.2d 1272 (1982).

91. *Id.* at 205, 447 A.2d at 1283.

scientific community for the purpose of memory retrieval."⁹² Yet, not all courts have applied the *Frye* doctrine in the same broad manner as the above courts.⁹³

In *State v. Hurd*,⁹⁴ the New Jersey Supreme Court found that even though the *Frye* rule is applicable to hypnosis, *Frye* does not preclude admission of hypnotically induced evidence. The *Hurd* court held that it is not "a precondition of admissibility, that hypnosis be generally accepted as a means of reviving truthful or historically accurate recall."⁹⁵ The purpose of hypnosis is not to obtain the truth, in the manner of a polygraph; rather, hypnosis is employed simply to overcome a witness memory problem, and it is considered reasonably reliable as long as it yields recollection that is as accurate as that of an ordinary witness.⁹⁶ The court proceeded to find that medical research has sufficiently established that hypnotic subjects "have the ability to concentrate on a past event and volunteer previously unrevealed statements concerning the event."⁹⁷ Consequently, "[i]n this limited sense, hypnosis has met the test imposed by *Frye*."⁹⁸

In analyzing the *Frye* rule and the purpose behind its application to hypnosis, the approach of the *Hurd* court to the issue is the most logical. The primary purpose for using hypnosis is to elicit previously inaccessible factual evidence from the witness. The function of hypnosis, in reaching this evidence, is to place the witnesses in a superior state of concentration⁹⁹ which will enable them to better remember the questioned events. Since it is accepted that hypnosis can properly alter a person's ability to concentrate on past events,¹⁰⁰ it is reliable in this strict sense, and therefore has adequately met the *Frye* standard.

C. A New Approach to Admissibility

After finding that hypnotically induced testimony meets the standards of the *Frye* test, the *Hurd* court addressed another hurdle concerning its admissibility. The court recognized that when hypnosis results in an out-of-court or in-court identifica-

92. *Id.* at 202, 447 A.2d at 1281.

93. At least one court has noted an alternative to the *Frye* rule, to be applied to hypnosis. The Florida District Court of Appeals in *Brown v. State*, 426 So.2d 76 (Fla. Dist. Ct. App. 1983), held that the test to be used in admitting hypnotically induced testimony is the relevancy test. So long as evidence is proven to be both logically and legally relevant, it is admissible under the relevancy test. If evidence is found to be logically relevant, the issue of legal relevance is then addressed. Logically relevant evidence is defined as "evidence tending to prove or disprove a material fact." FLA. STAT. § 90.401 (1979). Evidence is legally relevant if its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. . . ." FLA. STAT. § 90.403 (1979). Within the legal relevancy prong of the relevancy test, the reliability of the technique in question is an important factor to consider. The reliability of the evidence is directly related to the probative value of the scientific evidence. If the technique is not reliable, the evidence derived from it is unreliable, and therefore it is not legally relevant. *Brown v. State*, 426 So.2d 76, 87-89 (Fla. Dist. Ct. App. 1983). The relevancy approach thus differs from the *Frye* rule in that it does not automatically exclude evidence that is not generally considered reliable by the scientific community. Yet, it is similar to *Frye* in that the "novelty and want of general acceptance are *integral parts* of the relevancy analysis which may lessen the probative value of a scientific test on technique." *Id.* at 89 (citing Gianelli, *supra* note 80) (emphasis in original).

94. 86 N.J. 525, 432 A.2d 86 (1981).

95. *Id.* at 537, 432 A.2d at 92.

96. *Id.* at 537-38, 432 A.2d at 92.

97. *Id.* (quoting from the lower court decision, 173 N.J. Super. 333, 361, 414 A.2d 291, 305 (1980)).

98. *Id.*

99. See *supra* text accompanying note 13.

100. See Spector & Foster, *supra* note 12, at 570.

tion of the defendant, certain fifth amendment due process requirements must be met.¹⁰¹ An identification following a pretrial identification procedure must not be so unnecessarily suggestive as to cause irreparable mistaken identification, which in turn amounts to a violation of due process.¹⁰² The reliability of the evidence is the "linchpin in determining the admissibility of identification testimony."¹⁰³ The *Hurd* court concluded that if the hypnotically induced testimony satisfies certain requirements, it would also meet the Supreme Court's due process standards for identification.¹⁰⁴ These safeguards were held necessary to ensure a minimum level of reliability, as well as to provide an adequate record for evaluating the reliability of the hypnotic procedure:¹⁰⁵ The hypnotist should be a licensed psychiatrist or psychologist, professionally trained in the techniques of hypnosis;¹⁰⁶ the professional should be independent of either party in the litigation;¹⁰⁷ all information given to the hypnotist by the enforcement authorities must be in writing to determine the extent of the information given to the subject by the hypnotist;¹⁰⁸ prior to the hypnotic session, the hypnotist should acquire from the subject a detailed factual description as remembered by the subject to avoid adding new data to the witness' description of the events;¹⁰⁹ all contact between the hypnotist and the subject should be recorded to provide an available record for study that can later be used to determine whether the subject's past hypnotic memory has been tainted by outside information or suggestion;¹¹⁰ and only the hypnotist and the subject should be present during all phases of the hypnotic session.¹¹¹

The *Hurd* court indicated that if these procedures are met and no suggestive or coercive acts were used to influence the witness, then the hypnotically refreshed testimony should be admitted.¹¹² The court went on to hold that the determination of admissibility must be made in a hearing outside the presence of the jury¹¹³ and that the defendant has the initial burden of showing by a preponderance of the evidence that the hypnotic session was overly suggestive.¹¹⁴ If the defendant succeeds, the

101. 86 N.J. 525, 547, 432 A.2d 86, 97 (1981).

102. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). See also *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972):

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

103. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

104. 86 N.J. 525, 548, 432 A.2d 86, 98 (1981).

105. *Id.*

106. A hypnotist with these credentials "will be able to conduct the interrogation in a manner most likely to yield accurate recall." *Id.* at 545, 432 A.2d at 96.

107. *Id.*

108. *Id.* at 546, 432 A.2d at 96.

109. *Id.*

110. If possible the session should be videotaped. *Id.*

111. The purpose of this requirement is to avoid undesired influence or suggestion caused by another's presence. *Id.*

112. *Id.*

113. The Wyoming Supreme Court, in discussing the *Hurd* requirements, recognized them as valid concerns, but held that they bear only on the *credibility* of the witness, and not on the witness' *competency*. "Any one or all of the six points [the *Hurd* requirements] may, or may not, have bearing on the credibility of such witness in a given use. But to make the six points a foundation requirement to the competency of the witness is improper and unworkable." *Chapman v. State*, 638 P.2d 1280, 1284-85 (Wyo. 1982).

114. 86 N.J. 525, 546, 432 A.2d 86, 96 (1981).

burden shifts to the plaintiff to prove by clear and convincing evidence that the hypnotically induced evidence is reliable under the totality of the circumstances.¹¹⁵

The *Hurd* case demonstrates the approach of one court in allowing the use of pretrial hypnosis. The court adopted numerous intricate guidelines to follow as conditions precedent to admissibility, the purposes of which are to exploit the potential usefulness of hypnosis while simultaneously accounting for its deficiencies. Although the *Hurd* requirements constitute a valid method of ensuring the reliability of the hypnotic evidence, more detail as to the number and content of the requirements may be necessary, as will be explained below.¹¹⁶

D. A Case for Inadmissibility

In the 1982 decision of *People v. Shirley*,¹¹⁷ the California Supreme Court rejected the admissibility of hypnotically induced testimony in all cases.¹¹⁸ Yet, the specific facts of the case weighed heavily against the admission of the testimony into evidence. In *Shirley*, a rape victim claimed that the defendant illegally entered her apartment while she lay asleep on her living room couch. The victim awoke to find the defendant standing naked in front of her, holding a butcher knife. The defendant proceeded to force the victim to move to her bedroom and disrobe. He then allegedly raped her.¹¹⁹ The victim was intoxicated at the time of the rape,¹²⁰ and, as a result, her memory was blurred as to what had transpired. Since she could not properly perceive the events as they occurred, she was unable to correctly record those events in her memory.¹²¹

Shirley thus differed from a typical shock amnesia case in which the witness is able to perceive the occurrence of events and to record these perceptions accurately, but then forgets what was perceived and recorded.¹²² Consequently, in *Shirley*, it is doubtful that the victim had an accurate memory that could have been properly refreshed by hypnosis,¹²³ and the probable effect of hypnosis would have been merely to reinforce an inaccurate account of the events.

Another factor that discredited the validity of the hypnosis in *Shirley* was the lack of qualifications of the hypnotist.¹²⁴ The hypnotist was neither a psychiatrist nor a physician, and he purported to have only minimal training in administering hypnosis. Also, the subject in the case carried high expectations of what could be achieved with hypnosis, believing strongly that the hypnosis would allow her to "remember more than normal."¹²⁵ These factors reduced the reliability of the information that

115. *Id.*

116. *See infra* part VII.

117. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 458 U.S. 1125 (1982).

118. *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273.

119. *Id.* at 24-25, 641 P.2d at 777, 181 Cal. Rptr. at 245-46.

120. *Id.*

121. *Id.* at 74, 641 P.2d at 809, 181 Cal. Rptr. at 278 (Kaus, J., concurring and dissenting).

122. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 977 (1977).

123. 31 Cal. 3d 18, 74, 641 P.2d 775, 809, 181 Cal. Rptr. 243, 278 (1982) (Kaus, J., concurring and dissenting).

124. *Id.* at 75, 641 P.2d at 810, 181 Cal. Rptr. at 278 (Kaus, J., concurring and dissenting).

125. *Id.* at 30, 641 P.2d at 781, 181 Cal. Rptr. at 249.

was obtained from the hypnosis and provided an adequate basis for the court to disallow its use in the case at hand. Yet, because of these factors, the *Shirley* case itself was an inappropriate case in which to judge the utility of hypnosis. Therefore, it was not an adequate vehicle for the California Supreme Court to use in adopting a *per se* exclusionary rule for all hypnotically induced testimony.

IV. WITHIN THE COURTROOM: THE PROBLEMS WITH HYPNOSIS

The *Shirley* court, in rejecting the use of hypnotically induced testimony, drafted an extensive and well-written opinion explaining the numerous problems that arise from using hypnosis to refresh a witness' memory. The following discussion presents the major problems with hypnosis identified by the *Shirley* court and those that are often cited to forbid as unreliable the use of hypnosis in the pretrial process.

A. Suggestiveness

The foremost problem with hypnosis is its alleged unreliability in accurately refreshing one's memory.¹²⁶ As indicated by the *Shirley* court, hypnosis is considered unreliable primarily because of its ability to make an individual extremely susceptible to suggestion,¹²⁷ a condition termed "hypersuggestiveness."¹²⁸ Indeed, hypnosis has been described as a state of increased suggestibility.¹²⁹ This extreme state of suggestibility may cause individuals to lose or forego their own sense of critical judgment.¹³⁰ As a result, subjects may incorporate into their memories some cues from the hypnotist's questions or comments made during the session, or from the hypnotist's manner or conduct.¹³¹

B. Desire to Please

Similarly, subjects may acquire inaccurate memories by consciously attempting to produce positive results in the hypnotic session if they have a compelling desire to please the hypnotist or some other person present at the time of the session.¹³² This is termed "hypercompliance."¹³³ The subjects may wish to supply answers that they feel are expected of them. Thus, when individuals lack a clear memory and consequently are uncertain of how to respond to questions, they may confabulate¹³⁴ or

126. *Id.* at 34, 641 P.2d at 781, 181 Cal. Rptr. at 251. See also Diamond, *supra* note 16, at 332; Spector & Foster, *supra* note 12, at 589.

127. 31 Cal. 3d 18, 64, 641 P.2d 775, 802, 181 Cal. Rptr. 243, 271 (1982) (citing M. ORNE, ON THE SIMULATING SUBJECT AS A QUASI CONTROL GROUP IN HYPNOSIS RESEARCH: WHAT, WHY, AND HOW, IN HYPNOSIS: RESEARCH DEVELOPMENTS AND PERSPECTIVES 400-03 (Fromm & Schor eds. 1972); Diamond, *supra* note 16, at 333; Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 322-327 (1979); Orne, *The Nature of Hypnosis: Artifact and Essence*, 58 J. ABNORM. & SOC. PSYCH. 277, 280-86, 297 (1959)).

128. *Brown v. State*, 426 So.2d 76, 82 (Fla. Dist. Ct. App. 1983) (hypersuggestiveness is defined as "a mental state in which a subject surrenders a great degree of will power and independent judgment to the hypnotist.") (citing Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 WILLAMETTE L. REV. 665, 671-73 (1981)).

129. Diamond, *supra* note 16, at 333.

130. *State v. Hurd*, 86 N.J. 525, 539, 432 A.2d 86, 93 (1981).

131. *People v. Shirley*, 31 Cal. 3d 18, 64, 641 P.2d 775, 802, 181 Cal. Rptr. 243, 271, *cert. denied*, 458 U.S. 1125 (1982).

132. *Id.* at 64, 641 P.2d at 803, 181 Cal. Rptr. at 271.

133. *Brown v. State*, 426 So.2d 76, 83 (Fla. Dist. Ct. App. 1983).

134. See *supra* note 75.

fantasize their answers.¹³⁵ The subjects are said to have “manufactured” their statements.¹³⁶ For example, the subject in *Shirley* was sure that hypnosis would help her remember more than was otherwise possible. This belief may have caused the victim, while under hypnosis, to confabulate inaccurate statements and to give fabricated answers as part of her story, even though she was not certain of what truly happened.

The court in *State v. Mena*¹³⁷ addressed this problem by noting that in order for witnesses to testify strictly from their own recollections, they must recollect only from their prior observations, and not from any ill-conceived impressions implanted in their memories.¹³⁸ As the court indicated, many authorities are of the opinion that “a witness will recall memories fabricated under hypnosis as his own recollection and will be unable to distinguish his true memories from pseudomemories implanted during hypnosis.”¹³⁹ Thus, because of a hypnotized individual’s heightened suggestibility or compelling desire to please, false or unreliable recollection by the subject may result.

C. Unrecognizable “Pseudomemory”

Once subjects have incorporated confabulated material into their memory, they have created a “pseudomemory,”¹⁴⁰ which cannot be distinguished from a true memory.¹⁴¹ Subsequently, “when the subject repeats that recall [the pseudomemory] in the waking state (*e.g.*, in a trial), neither an expert nor a lay observer (*e.g.*, the judge or jury) can make a similar distinction.”¹⁴² After the hypnotic session, the witnesses are said to remember the *content* of their new memories, but to have forgotten the *source*; this is why such a witness is unable to distinguish between real and fabricated recollections.

D. “Unshakeable” Testimony

Once pseudomemory has contaminated a subject’s memory, not only is it indistinguishable from true memory, but the witness also acquires excessive confidence in its accuracy. The *Shirley* court stated that the witness “will become convinced that the story he told under hypnosis is true and correct in every respect.”¹⁴³ Such an effect on the witness’ story is sometimes enhanced by a posthypnotic suggestion for the witness to remember everything upon awakening, or simply by the witness’ own belief that hypnosis will help in remembering the entire event clearly,¹⁴⁴ as in

135. *People v. Shirley*, 31 Cal. 3d 18, 64, 641 P.2d 775, 803, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125 (1982).

136. *Id.* at 73, 641 P.2d at 808, 181 Cal. Rptr. at 277 (Kaus, J., concurring and dissenting).

137. 128 Ariz. 226, 624 P.2d 1274 (1981).

138. *Id.* at 230, 624 P.2d at 1278 (1981) (citing 9 *ENCYCLOPEDIA BRITANNICA* 133 (1974); Diamond, *supra* note 16; Dilloff, *supra* note 75).

139. *Id.*

140. *Id.*

141. *People v. Shirley*, 31 Cal. 3d 18, 65, 641 P.2d 775, 803, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125 (1982).

142. *Id.*

143. *Id.* See also Diamond, *supra* note 16, at 339.

144. *People v. Shirley*, 31 Cal. 3d 18, 65, 641 P.2d 775, 803, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125 (1982).

Shirley.¹⁴⁵ The problem with this increased confidence is that it tends to make the witness appear "unshakeable" while on the witness stand.¹⁴⁶ As the *Shirley* court noted, "the witness's [sic] conviction of the absolute truth . . . grows stronger each time he is asked to repeat the story; . . . the resulting 'memory' may be so fixed in his mind that traditional legal techniques such as cross examination may be largely ineffective to expose its unreliability."¹⁴⁷ Similarly, the *Mena* court noted that the effect of cross-examination may be lost after an individual has undergone hypnosis: "[H]e [the witness] will often be more convinced of the accuracy of such hypnotically induced memories than those recalled due to the witness' actual observations."¹⁴⁸ Jurors may be misled in judging the demeanor of a hypnotized witness and in turn may give more credence to the witness' testimony than they would have had hypnosis not been administered.¹⁴⁹

V. ARE THESE PROBLEMS UNIQUE TO HYPNOSIS?

Although the reliability of hypnotically induced testimony is sometimes disputed, when used properly hypnosis can be a beneficial and productive instrument that assists the fact-finder, and, "[a]s such, it may, under proper analysis, provide a useful method for obtaining otherwise inaccessible information for the fact-finder, which like any testimony is subject to inherent problems of memory and perception."¹⁵⁰ Moreover, as was also mentioned above, many of the same reliability problems present with hypnotically induced testimony have also been found to be present with ordinary eyewitness testimony.

The problems with ordinary testimony typically result from imperfections inherent in memory recall. Studies have shown that memory is not a mere reproduction of perceived events.¹⁵¹ Rather, inaccurate details not representative of the events in question are often incorporated into witnesses' memories. Confabulation is the result. Witnesses fill in the gaps in their memories by unconsciously confabulating to make the total picture of the event conform to their expectations of what must have occurred.¹⁵² For example, when a witness' description of an event or suspect grows

145. See *supra* text accompanying note 125.

146. *State v. Mack*, 292 N.W.2d 764, 769 (Minn. 1980).

147. 31 Cal. 3d 18, 65-66, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272 (1982).

148. 128 Ariz. 226, 230, 624 P.2d 1274, 1278 (1981).

149. It may be asserted that because of its adverse impact on the efficacy of cross examination, pretrial hypnosis raises sixth amendment confrontation clause problems. But, as is explained in the subsequent text, so long as proper procedures are followed, hypnosis renders cross examination no more ineffective than does normal eyewitness testimony. Hence, the use at trial of hypnotically induced testimony raises no significant confrontation clause problems. For a closer look at the confrontation clause in general, see *Ohio v. Roberts*, 448 U.S. 56 (1980); *Davis v. Alaska*, 415 U.S. 308 (1974); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965). See also Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining when Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Graham, *The Confrontation Clause, The Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1979); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

150. Spector & Foster, *supra* note 12, at 613.

151. *State v. Hurd*, 86 N.J. 525, 541, 432 A.2d 86, 94 (1981). See generally Baggett, *Memory for Explicit and Implicit Information in Picture Stories*, 14 J. VERBAL LEARNING & VERBAL BEHAVIOR 538 (1975); Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23; Note, *supra* note 122, at 983.

152. Note, *supra* note 122, at 983.

more detailed as time goes by, the witness has probably altered the recollection to include extra details acquired from mug shots, newspaper reports, or police investigations.¹⁵³

Other problems also arise with nonhypnotic eyewitness testimony. Often a witness' perceptions of an event are greatly altered by the questioning and interrogation that follow. The witness feels obligated to remember every detail concerning the incident in question. The interrogator may directly or indirectly pressure the witness into giving some type of response, regardless of whether the witness is sure of what really happened.¹⁵⁴ Interrogators may also use leading or suggestive questions that tend to impose their views of the incident on the witness. Such distortion may occur when the interrogators have a certain suspect in mind, or their own theories about the case, although it is not limited to such instances.¹⁵⁵ The overt suggestion and views of the interrogator become a permanent part of the witness' recollection of the event: "These suggestions transmitted during the interrogation process have been found to affect not only the witness' immediate answer, but also his subsequent recollection of the event."¹⁵⁶

A witness also may be influenced through undue suggestion in other ways. The use of photographs, showings,¹⁵⁷ or lineups to identify the defendant may result in providing the subtle clues that influence the witness in the selection process.¹⁵⁸ Moreover, the witness' desire to please and to avoid looking foolish may affect the outcome of a lineup by exerting pressure to identify a suspect, even though the true culprit is not present.¹⁵⁹

As a result of the above described influences, an innocent defendant conceivably could be prosecuted and wrongly convicted of a crime.¹⁶⁰ The problems resulting from suggestion were recognized by the Supreme Court in *United States v. Wade*,¹⁶¹ in which the Court stated that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."¹⁶² The facts of the well-known case of Sacco and Vanzetti are illustrative of the profound effect that improper suggestion and confabulation have on nonhypnotic witnesses.¹⁶³

In that controversial case, two men were seen leaning against a residential fence,

153. *Id.*

154. *Id.* at 984.

155. E. LOFTUS, EYEWITNESS TESTIMONY 76 (1979).

156. *State v. Hurd*, 86 N.J. 525, 542, 432 A.2d 86, 94 (1981) (citing Note, *supra* note 122, at 984).

157. A showing is a one-to-one confrontation between the eyewitness and the suspect, in which the witness is permitted to view the suspect by himself. The showing is considered to be the most suggestive of identification procedures. L. TAYLOR, *supra* note 29, at 101 (1982).

158. See generally N. SOBEL, EYEWITNESS IDENTIFICATION (1982). See also *United States v. Wade*, 388 U.S. 218 (1967) (suspect has a constitutional right to have counsel present at a pretrial lineup).

159. Note, *supra* note 122, at 988.

160. For an example of how innocent men have been falsely convicted through misidentification see E. BORCHARD, CONVICTING THE INNOCENT (1932).

161. 388 U.S. 218 (1967).

162. *Id.* at 229 (quoting from P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965)).

163. The synopsis of the now infamous case of Sacco and Vanzetti is paraphrased from the account in L. TAYLOR, *supra* note 29, at XIII-XV (1982).

watching while a cashier and his bodyguard walked by with bags containing over \$15,000. One of the leaning men suddenly jumped forward, pulled a gun and shot the bodyguard and cashier. A car pulled up next to the bodies, and the two men jumped in and were quickly driven away.

Some time later, police arrested Nicola Sacco and Bartolomeo Vanzetti. Witnesses to the shooting were repeatedly shown photographs of the suspects and brought in to identify the two men while they were being held in jail.

At the subsequent trial, four witnesses positively identified Vanzetti. Yet, not one of them had been able to identify him originally; only after repeatedly being shown photographs of Vanzetti were they finally able to confirm his role in the murders.

The case against Sacco was similar. Five eyewitnesses positively identified the Italian shoemaker at trial. Yet, one had earlier admitted that he had not seen enough to identify either of the killers. Another advised police that she had not been able to see the faces of either of the two men at the time of the incident. A third had previously told three different persons that he could not make an identification. A fourth had testified at the preliminary hearing that she had not seen enough at the time of the crime to identify Sacco.

At the trial, one of the witnesses positively identified Sacco as the man in the back seat of the getaway car and gave the following detailed description:

"[He was] slightly taller than I am. He weighed possibly from 140 to 145 pounds. He was muscular—he was an active man. I noticed particularly the left hand was a good sized hand, a hand that denoted strength. . . . He had a gray, what I thought was a shirt . . . the face was what we could call clear-cut, clean-cut face. Through here was a little narrow, just a little narrow. The forehead was high. The hair was brushed back and it was between, I should think, two inches and two and one-half inches in length, and had dark eyebrows, by the complexion was a white, a peculiar white that looked greenish."¹⁶⁴

The witness made her observations based on having seen the killers in the car for only two or three seconds as it sped away. She was sixty to eighty feet from the car. On the basis of such testimony, and despite seemingly solid alibis,¹⁶⁵ Sacco and Vanzetti were convicted of murder and eventually electrocuted.

The Sacco and Vanzetti case illustrates, in a shocking way, how suggestion (the repeated showing of the photographs)¹⁶⁶ and confabulation¹⁶⁷ (the details with which the witnesses identified Sacco) can completely distort witnesses' memories, and hence their testimony. Also, as was exemplified by the infamous case, it is very difficult to disclose these distortions through cross-examination or otherwise, since

164. *Id.* at XIV.

165. A merchant testified that Vanzetti was buying cloth from him in Plymouth at the time of the shootings, and a clerk from the Italian consulate in Boston clearly recalled Sacco applying for a passport on that day. *Id.*

166. In commenting on the Sacco and Vanzetti case and in particular on how the witnesses moved from uncertainty to complete certainty, one author commented: "Legal scholars who analyzed the identification techniques claimed that numerous improper methods produced this result. Other reports indicated that not a single person could originally identify Vanzetti, but that the repeated showing of his photographs to various witnesses finally produced identifications from a number of them." See E. LOFRUS, *supra* note 155, at 2.

167. See *supra* note 75. See also Buckhout, *supra* note 151, at 25, in which the author, in a discussion of the witness' description of Sacco, stated that "[t]he description must have been a fabrication."

by the date of trial the witnesses had repeated their stories so many times¹⁶⁸ that they had acquired false confidence in their recollections, a confidence that increased with time and with every retelling. Such confidence is a false confidence since research has shown that the degree of confidence witnesses have in their memories does not accurately correlate with the accuracy of the recollection in question; on the contrary, the reverse is sometimes true.¹⁶⁹ Such overconfidence carries with it a potential for causing juries to lend excessive credence to the testimony, either because the witness appears confident on the stand, or because the witness is unshakeable on cross-examination.

The difficulties identified with hypnosis are thus the same problems that are inherent in normal eyewitness recall. Yet, when the admissibility of hypnotically induced testimony is discussed, these problems tend to be amplified and associated exclusively with the hypnotic process itself. Although it is true that because it causes a heightened state of suggestibility, hypnosis may marginally aggravate the problems entangled with ordinary testimony, this fact alone is not sufficient to warrant its exclusion. So long as testimony induced by hypnosis "is comparable in accuracy to normal human memory,"¹⁷⁰ it should be held admissible in a court of law.

VI. OVERCOMING THE PROBLEMS WITH HYPNOSIS

In order to guarantee that hypnotically induced testimony is "comparable in accuracy to normal human memory," courts should strictly adhere to the following set of guidelines.

A. A *Qualified Hypnotist*

Initially, to ensure that the hypnosis is properly administered, a licensed psychiatrist or psychologist who is trained in the use of hypnosis should carry out the treatment. The reasons for this are obvious. The hypnotist must fully understand the technique and the procedures required to carefully refresh the subject's memory without causing damage to the subject's recall or the subject's general mental condition.¹⁷¹ The hypnotist should also be studiously impartial, to avoid unconsciously coloring the subject's recall in a particular direction. To improve impartiality, the courts should adopt a system by which only court-appointed hypnotists¹⁷² are used to conduct the hypnosis. This system not only would ensure unbiased results, but would also guarantee that an appointed hypnotist has the appropriate credentials to perform the treatment. The court, in turn, would not have to waste the time and resources to determine, each time hypnosis was used, whether or not the hypnotist was properly

168. See *infra* note 196.

169. Note, *supra* note 122, at 985.

170. *State v. Hurd*, 86 N.J. 525, 543, 432 A.2d 86, 95 (1981).

171. For a look at the mental problems that can result from improperly administering hypnosis, see W. BRYAN, *LEGAL ASPECTS OF HYPNOSIS*, 9-33 (1962).

172. See Note, *Hypnosis in Court: A Memory Aid for Witnesses*, 1 GA. L. REV. 268, 287 (1967). The use of a court-appointed hypnotist will also induce the court to keep records on hypnotic cases in order to determine, through empirical evidence, the efficacy of hypnosis in the courtroom. *Id.* at 287-88.

qualified, since this already would have been determined. The cost of the system could be borne by the parties requesting the hypnosis.¹⁷³

B. Strict Procedures To Follow

Once the hypnotist becomes involved in the case, an initial determination must be made concerning the effectiveness of hypnotic treatment in the case at hand. The hypnotist must determine whether hypnosis is an appropriate device in helping refresh the witness' memory. The reason for the subject's memory loss and the nature of the memory loss are important factors to consider in evaluating the reliability of hypnosis in restoring recall.¹⁷⁴ Hypnosis is most reliable when there is a traumatic neurosis, or some other pathological reason for the memory deficiency,¹⁷⁵ although it is not necessarily limited to such problems.¹⁷⁶

If a determination is made that hypnosis would be effective in a particular case, a series of procedural safeguards should nevertheless be followed to preserve the accuracy of the witness' recollections. Many of these safeguards were expressed by Dr. Martin Orne,¹⁷⁷ whose influence was in large part responsible for the specific set of requirements adopted by the court in *State v. Hurd*.¹⁷⁸ First, only the hypnotist and the subject should be present during the session.¹⁷⁹ This prevents the possibility of other persons (e.g., the attorney who requested hypnosis) influencing the subject while under hypnosis.¹⁸⁰

Second, in questioning the subject, the psychiatrist or psychologist should avoid using leading or suggestive questions or conduct. The purpose of this is, similarly, to avoid corrupting the subject's memory with suggestion.¹⁸¹ Preventing suggestion from affecting a subject's memory is a delicate matter; hypnosis is, by definition, a state of suggestibility.¹⁸² The hypnotist therefore must adopt a particularly passive technique. Prior to the hypnosis, the hypnotist should avoid any unneeded communication with people involved in the case, since this could influence the hypnotist's opinion.¹⁸³ Preferably, only a written memorandum outlining the facts of the

173. Exceptions can be made, of course, for indigent parties.

174. *State v. Hurd*, 86 N.J. 525, 544, 432 A.2d 86, 95 (1981) (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 325 (1979)).

175. *Id.*

176. *Id.* at 544 n.4, 432 A.2d at 95 n.4.

177. Dr. Martin Orne, a well-known psychiatrist and psychologist, is the Editor of the *International Journal of Clinical and Experimental Hypnosis* and is director of the Institute for Experimental Psychiatry at the University of Pennsylvania. He is "one of the foremost experts on the subject of hypnosis." *Brown v. State*, 426 So.2d 76, 89 (Fla. Dist. Ct. App. 1983).

178. 86 N.J. 525, 432 A.2d 86 (1981). See *supra* text accompanying notes 94-115.

179. 86 N.J. 525, 546, 432 A.2d 86, 97 (1981).

180. It is important to note that the attorneys involved in the action should be permitted to view the session through a two-way mirror.

181. A subject under hypnosis is extremely susceptible to suggestion. See *supra* note 128 and text accompanying notes 127-31.

182. See Diamond, *supra* note 16, at 333.

183. For example, verbal communication with the attorneys or investigators involved in the case should be avoided. See *State v. Hurd*, 86 N.J. 525, 546, 432 A.2d 86, 96 (1981) (court notes that the extent of the information given to the hypnotist will help determine the amount of suggestion the hypnotist may have communicated to the subject).

case should be given to the hypnotist.¹⁸⁴ Finally, prior to the session, the hypnotist should interview the witness to acquire an accurate account of the facts as remembered by the witness, for it is important to record the witness' prehypnotic account of the incident.¹⁸⁵

Because of hypercompliance¹⁸⁶ and subjects' tendencies to believe that hypnosis will help them remember more than normal, witnesses may fantasize or confabulate memories.¹⁸⁷ To help avoid this problem, hypnotists should, in the prehypnosis interviews, explain to witnesses that hypnosis is not productive in all cases with all subjects and that it may not always result in adequate refreshment of an individual's memory.¹⁸⁸ An adequate explanation should remove from witnesses' mind the strong belief that hypnosis will make them remember more than normal. Similarly, cautioning subjects to respond only to questions they can adequately answer and to refrain from giving answers merely to avoid appearing ignorant will be profitable. Such a warning, along with a further warning to refrain from being overly responsive, should be sufficient to negate a subject's loyal desire to please.

The problem of subjects becoming overly confident in their convictions concerning the incidents in question is sometimes caused by a hypnotist's imposition of a posthypnotic suggestion upon witnesses to recall all that was said while they were under hypnosis.¹⁸⁹ For example, in *People v. Davis*¹⁹⁰ a policeman-hypnotist directed his subject in the following manner: "What you'll find at the end of [the hypnotic session], you'll have practically a photographic recall of everything I ask you and everything you answer. . . ."¹⁹¹ Such a statement may cause a witness' recall to appear exact and detailed, when it is actually vague and uncertain.¹⁹² Thus, posthypnotic suggestions should not be employed when hypnotizing a subject in preparation for trial testimony.

Even without posthypnotic suggestions, witnesses' personal expectations concerning the effect of hypnosis may cause them to be excessively confident in their hypnotically induced recollections.¹⁹³ As noted previously,¹⁹⁴ this matter can be resolved by the hypnotist's explaining the limitations of the technique. A witness is to be informed concerning the practical effects of the hypnosis and its true ability to help the subject accurately remember.

The court in *People v. Shirley* noted a further cause of the overconfidence

184. Note, *The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?* 60 WASH. U.L.Q. 1059, 1074-75 (1982).

185. *Id.* See also *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (admission of prehypnotic testimonial evidence is dependent on a careful record of the witness' prehypnotic memory).

186. See *supra* text accompanying note 133.

187. See *supra* note 75.

188. The subject may not be susceptible to hypnosis, *Spector & Foster*, *supra* note 12, at 569, or the particular case may not be one which is appropriate for hypnosis. See *State v. Hurd*, 86 N.J. 525, 544, 543 A.2d 86, 95 (1981).

189. *People v. Shirley*, 31 Cal. 3d 18, 65, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125 (1982).

190. No. 52,660 (Super. Ct. Placer Co., Cal., July 30, 1979).

191. *Id.* See *Diamond*, *supra* note 16, at 340.

192. *Spector & Foster*, *supra* note 12, at 593; *Diamond*, *supra* note 16, at 340.

193. *People v. Shirley*, 31 Cal. 3d 18, 65, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125 (1982).

194. See *supra* text accompanying note 188.

problem. The court feared that before witnesses testify at trial, they have repeated their stories so frequently that their testimony has become staunchly fixed in their minds, and it would render cross-examination ineffective.¹⁹⁵ Yet, this problem is not unique to hypnosis. In most cases witnesses repeat their stories numerous times prior to trial.¹⁹⁶ Hence, regardless of whether hypnosis is employed, the result is the same—the witness retains strong convictions of the facts surrounding the events in question.

C. *Coping with a Perplexed Jury*

One final problem in using hypnosis is that once the jury becomes aware that the witness has undergone hypnosis, a stigmatizing effect on the jury may result.¹⁹⁷ The jury may be unduly impressed or mystified by the very use of hypnosis. At this point the court should admit expert testimony to explain the scientific technique of hypnosis and to inform the jury of the extent to which hypnosis can affect an individual's testimony. The jurors will then better understand hypnosis and will comprehend how hypnosis can help or harm a person's recollection, and will be in a position to evaluate objectively the credibility of the testimony before them.

Perhaps a more efficient way of dealing with a mystified jury is to refrain from communicating to them that hypnosis was used. If the court and the adverse party to the action are satisfied that all the safeguards were properly followed and that no injury to the witness' recollection occurred, then there is no need to inform the jury of the use of hypnosis. In this situation, as in most others, the prevention is more effective than the cure. The court's time will be saved, and a battle of the experts, which in the end may tend only to confuse the jury, will be prevented.

This approach omits the requirement of laying a proper foundation before the hypnotically induced testimony can be admitted and is consistent with the approach adopted by the Ninth Circuit:¹⁹⁸ "[U]nless an adverse party attacks the witness's [sic] ability to recall by bringing out or exploring the fact of hypnosis, the use of expert testimony to support the efficacy of hypnosis is improper."¹⁹⁹ Thus, to comply with this approach, not only is it unnecessary for the party who called the witness to lay a foundation for the testimony, but it is impermissible to do so unless the opposing party first raises the issue.²⁰⁰

D. *Pretrial Hearings*

To determine whether the above safeguards have been adhered to adequately, a pretrial hearing on the matter should be held.²⁰¹ In this hearing, if the court finds that

195. 31 Cal. 3d 18, 65-66, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272 (1982).

196. A typical scenario can be described as follows: Following the event in question, a witness tells her story to the police, describes it to her family and friends, explains it to the lawyer of the proponent party in the case, relays it to the opposing attorney in the form of a deposition, rehearses it several times prior to trial with the proponent's lawyer, and then finally testifies at trial.

197. See Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56, 58 (April 1981).

198. *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), cert. denied, 444 U.S. 885 (1979).

199. *Id.* at 670.

200. *Id.*

201. *State v. Hurd*, 86 N.J. 525, 543, 432 A.2d 86, 95 (1981).

all the required procedures have been followed, and the witness' testimony is sufficiently untainted, the court should admit the testimony into evidence. To facilitate the judge's determination, hypnotic sessions should be videotaped.²⁰² A videotape of the hypnosis allows the judge to view the hypnotic therapy directly in deciding whether or not the necessary procedures were properly followed. In addition it gives the attorneys in the action another opportunity to review the session.²⁰³ Also, before the court reviews the videotape of the hypnosis, the parties can properly introduce expert opinion on the validity of the hypnotically induced testimony.²⁰⁴ This expert testimony will educate the judge on the hidden problems in using hypnosis and will facilitate the determination as to whether the technique used was proper.

E. *The Preservation Deposition*

After considering each party's evidence on the matter and examining the videotape, the court may find that the hypnotically induced testimony is too suspect to be of probative value.²⁰⁵ In such a case, or, similarly, in those states that do not admit hypnotically induced testimony, a court may take one of three positions to determine the fate of the witness' testimony. One is that the witness may be permitted to testify, but only about matters that are wholly unrelated to the matters questioned in hypnosis.²⁰⁶ Alternatively, the witness may be precluded from testifying as to any matter at all.²⁰⁷ The third choice is to allow the witness to testify, but only as to knowledge the witness possessed prior to hypnosis.²⁰⁸ In either of the first two situations, the party requesting the hypnosis is likely to lose all of the relevant evidence otherwise obtainable from the witness. To avoid this loss of testimonial evidence, a preservation deposition should be taken before the witness undergoes hypnosis. This deposition will preserve the witness' testimony and should be admissible at trial in the event that the witness is precluded from testifying because of the

202. *Id.* at 546, 432 A.2d at 97. *But see* Diamond, *supra* note 16, at 339. The victim's knowledge of the use of videotape is itself a distorting factor, since it will tend to alter his attitude and behavior.

203. The attorneys in the case should have at least one opportunity to view the tape, in order to raise any objections they may have at the pretrial hearing.

204. The expert testimony should be given to the judge before the videotape is shown, so that the judge will know what procedure is proper.

205. According to Rule 403 of the Federal Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

206. The courts that permit a witness to testify only concerning prehypnotic knowledge also implicitly permit the witness to testify about matters wholly unrelated to the hypnosis. This, however, remains a separate alternative for the courts, *i.e.*, a court may refuse to admit any evidence that was related to the hypnosis, even though it can be shown that the witness had knowledge of the same evidence prior to hypnosis, but the court may still allow the witness to testify to matters unrelated to those dealt with under hypnosis.

207. *See* People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 458 U.S. 1125 (1982). *See also* Dilloff, *supra* note 75, at 21. Under this alternative the witness is, in effect, considered incompetent to testify.

208. *See* State *ex rel* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Quintanar, ___ Colo. App. ___, 659 P.2d 710 (1982); Pearson v. State, ___ Ind. ___, 441 N.E.2d 468 (1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (1981); State v. Koehler, 312 N.W.2d 108 (Minn. 1981); People v. Hughes, 88 A.D.2d 17, 452 N.Y.S.2d 929 (N.Y. App. Div. 1982); People v. Smith, 117 Misc. 2d 737, 459 N.Y.S. 2d 528 (N.Y. App. Term 1983); Commonwealth v. Taylor, 294 Pa. Super. 171, 439 A.2d 805 (1982).

imprecision of the hypnosis.²⁰⁹ Obviously, the adverse party must have the opportunity to cross-examine the witness at the deposition.²¹⁰

In the third situation, the witness can testify to matters known prior to hypnosis, but only if a careful record of the witness' prehypnotic memory is preserved.²¹¹ A recording of the prehypnotic memory of the event in written, tape-recorded or videotaped form will suffice.²¹² The purpose of this third category is to allow the police the benefit of hypnosis as an investigatory tool without losing the benefit of the witness' prehypnotic testimony at trial.²¹³ In all three situations, the effect of the deposition would be to allow the witness to testify about matters recalled prior to hypnosis, either in person (situation three) or through the deposition (situations one and two).

The above procedural safeguards are necessary to protect the accuracy and the reliability of a witness' testimony. These requirements must be complied with stringently to guarantee admission of the testimony into evidence.²¹⁴ If the party attempting to introduce the hypnotically induced testimony establishes by clear and convincing evidence the reliability of the testimony, the evidence should be admitted. A strict standard of clear and convincing evidence is desirable as a further safeguard to guarantee the reliability of the evidence. Once the evidence is admitted, the opponent of the hypnosis should be permitted to challenge the reliability of the testimony at trial, but not the reliability of hypnosis in general.²¹⁵

In attacking the reliability of the testimony, the adverse party may or may not, as the circumstances warrant, disclose that hypnosis was administered in refreshing the witness' memory. If the use of hypnosis is disclosed, both parties may submit evidence as to the appropriateness of applying hypnosis in the case at hand, and as to the hypnotist's adherence to proper procedures of hypnosis.²¹⁶

If a party attempts to impeach a witness by using a prehypnotic deposition or other prehypnotic statements (*e.g.*, statements to the police) to show that the witness was not able to remember certain events or had given answers inconsistent with his in-court testimony, the proponent party, under the theory of rehabilitation, should then be permitted to rehabilitate the witness by disclosing that hypnosis had been administered to the witness after these prior statements. After it becomes known that hypnosis was used, expert testimony should then be admitted to explain the concept and its applicability in the instant case. Again, the door has now been opened.

209. The preservation deposition would be an exception to the Hearsay Rule (FED. R. EVID. 802) by virtue of Rule 804(b)(1), under which "a deposition taken in compliance with law" is former testimony, which is not subject to the hearsay rule. The witness would be incompetent to testify, and should therefore meet the 804 requirement of unavailability; as Rule 804(a) states: "Unavailability as a witness" includes situations in which the declarant . . . (4) is unable to be present or to testify at the hearing because of mental illness or *infirmity*." FED. R. EVID. 804(a)(4) (emphasis added).

210. Note, *supra* note 184, at 1085 n. 169.

211. *Commonwealth v. Kater*, 388 Mass. 519, ___, 447 N.E.2d 1190, 1197 (1983).

212. *People v. Quintanar*, ___, Colo. App. ___, 659 P.2d 710, 713 (1982).

213. *Id.*

214. This stringent burden of proof is justified because of the potential abuse which can arise when hypnosis is not properly utilized. See *State v. Hurd*, 86 N.J. 525, 546-47, 432 A.2d 86, 97 (1981).

215. *Id.* at 543, 432 A.2d at 95.

216. See *supra* text accompanying notes 171-213.

Allowing the proponent of the hypnosis to divulge that hypnosis was employed will prevent the adversary from unfairly impeaching the witness with prior inconsistent statements when the jury has not also been informed that hypnosis had been administered.

VII. CONCLUSION

Although hypnosis has been generally accepted in the medical community and in the field of criminal justice, it has yet to achieve similar acceptance within the court system. Many courts have permitted its employment to help potential trial witnesses refresh their imperfect conscious memories, while other courts have rejected this application because of the claimed problems inherent in the process. Some of the courts and commentators that have addressed the issue of hypnosis have assumed that the difficulties involved are substantially unique to the hypnotic process. Yet, as revealed above,²¹⁷ the problems with hypnotically induced testimony are not unique to the use of hypnosis, but are common to eyewitness testimony in general.

Obviously, courts are not prepared to exclude all ordinary eyewitness testimony simply because of the inaccuracies that may result; to do so may leave the courts "little choice but to return to trial by combat or ordeal."²¹⁸ The new issue involves a balancing of interests: Are the potential risks that arise in using ordinary testimony outweighed by its apparent benefits? The answer is an obvious "yes," for eyewitness testimony today represents a major cornerstone in our trial process. Still, it is admitted that ordinary testimony is not without its drawbacks. To deal with these problems, ordinary testimony has not been wholly excluded; instead, numerous exceptions to the rules of admission have been developed.

Similarly, it must be conceded that hypnosis is not without its faults. When used inappropriately, or administered improperly, hypnosis can easily contaminate a witness' memory. But just as rules are followed to circumvent the problems with nonhypnotic testimony, similar rules can be complied with to minimize the difficulties inherent in hypnotic testimony. Some courts and legislators²¹⁹ have already adopted necessary procedures designed to guarantee the reliability of hypnosis and simultaneously to avoid its deficiencies.

In sum, the following procedural rules should be observed when using hypnosis to refresh a witness' recollection:

217. See *supra* text accompanying notes 150-72.

218. *People v. Shirley*, 31 Cal. 3d 18, 76, 641 P.2d 775, 810, 181 Cal. Rptr. 243, 279 (Kaus, J., concurring and dissenting), *cert. denied*, 458 U.S. 1125 (1982).

219. The State of Oregon has enacted a series of statutes governing the admissibility of hypnotic testimony. See OR. REV. STAT. §§ 136.675-136.695 (1979). The statutes are too barren in their standards to be considered complete, in that the only procedural safeguard expressly required is a recording of the hypnotic procedure. OR. REV. STAT. § 136.675 is entitled "Conditions for use of testimony of persons subjected to hypnosis," and reads as follows:

If either prosecution or defense in any criminal proceeding in the State of Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805 to 135.990.

- (1) The hypnosis should be administered only by a court-appointed, licensed psychiatrist or psychologist, who is professionally trained in the use of hypnosis.
- (2) A preservation deposition should be taken prior to the hypnosis.
- (3) A court-appointed hypnotist must determine whether hypnosis is an appropriate method of refreshing the witness' memory given the facts and the circumstances of the case before the court.
- (4) Any information given to the hypnotist prior to the hypnotic session must be in written or recordable form.
- (5) Videotape or some other mechanical taping device must be employed to maintain a complete record of the hypnotic procedure. A complete record includes all substantive contact between the hypnotist and the witness.
- (6) The hypnotist should conduct a prehypnotic interview with the subject to obtain a detailed description of the facts as the subject recalls them. Also, during this interview, the hypnotist should caution the subject regarding false expectations concerning the success of the treatment, and should warn the subject not to be overly responsive in an attempt to please or look good.
- (7) Only the hypnotist and the subject are to be present during the session. The hypnotist should not use any suggestive or leading questions. The hypnotist should impose no posthypnotic suggestions on the subject.

If all of these procedures have been properly followed (a pretrial hearing should be held to decide this issue) and it is determined that the testimony adduced from hypnosis is convincingly reliable, then the hypnotic testimony should be admitted into evidence before the court.

To secure the "promotion of growth and development of the law of evidence,"²²⁰ the courts must utilize every reasonable means available to present the fact-finder with as much probative evidence as possible. Hypnosis represents one method of obtaining evidence that is normally unobtainable. It places the fact-finder in a more comfortable position when deciding the ultimate issues of the case. Hence, when appropriate, it should be employed to assure that the trier of fact is given every opportunity to arrive at the most correct and just result attainable.

Richard G. Montevideo

220. This is found in Rule 102, Purpose and Construction of the Federal Rules of Evidence. FED. R. EVID. 102.